BEFORE THE FLORIDA SUPREME COURT

Microtel, Inc.,

Appellant,

vs. CASE NO.: 64,801

CHAIRMAN GERALD GUNTER,
COMMISSIONER JOSEPH CRESSE,
COMMISSIONER JOHN MARKS III,
COMMISSIONER KATIE NICHOLS, and
COMMISSIONER SUSAN LEISER, as and constituting
the FLORIDA PUBLIC SERVICE COMMISSION,

Appellees.

BRIEF OF APPELLANT, MICROTEL, INC.

Appeal From Orders of Florida Public Service Commission
Granting to MCI Telecommunications Corporation
A Statewide Certificate to Provide Telephone for Hire Service

Due Date: April 5, 1984
Date Filed: April 4, 1984

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References

References in this brief to the record will be "R___;" to the transcript of record "Tr _____;" to any exhibits introduced into evidence by "Ex _____;" and the page number at which said exhibit was received into evidence; and to the appendix to this brief by "App _____."

Statement of the Case

By application filed on November 3, 1982, MCI Telecommunications Corporation (here-in-after referred to as MCI), filed an application before the Florida Public Service Commission (here-in-after referred to as the FPSC or the Commission) for authority to offer to the general public for hire intercity communications common carrier services by the use of microwave and other means, but not limited to, the resale of MTS and WATS services between points in the state of Florida, pursuant to the provisions of Section 364.33, 364.335, and 364.337, Florida Statutes (1982). (R 1)

Timely petitions to intervene in the proceeding were filed by Microtel, Inc. (here-in-after referred to as Microtel), General Telephone of Florida, Inc. (here-in-after referrred to as GTF), and Southern Bell Telephone & Telegraph Company, Inc. (here-in-after referred to as Bell). (R 147, 149, 166)

Appropriate orders were issued by the Commission granting said interventions at 157, 165, and 169 respectively. A pre-hearing conference was held before the Commission on March 14, 1983 and an order on the pre-hearing conference was issued by the Commission. (R 174) Hearings were held before the Commission on March 21, 1983, after which the parties were permitted to file briefs on April 19, 1983. On July 25, 1984, Order No. 12292 was issued by the Commission granting

the application sought by MCI. (R 264) An appropriate and timely Motion for Reconsideration, Motion for Stay, and Request for Oral Argument was filed by Microtel on August 9, 1983 and MCI likewise filed a Motion for Reconsideration of a portion of same order on August 9, 1983. (R 272, 281) On December 29, 1983, the Commission entered Order No. 12824 denying the Petition for Reconsideration of Microtel and the petition of MCI. (R 308)

It is to Order No. 12292 granting the certificate issued July 25, 1983 and Order No. 12824 denying reconsideration to which this appeal is directed. Timely notice of appeal was filed by Microtel on January 26, 1984. (R 326) For convenience of the Court, copies of Orders 12292 and 12824 are attached in the Appendix to this brief.

Brief Procedural Explanation

The application filed by MCI with the Commission actually sought two separate types of authority. The first was authority to purchase bulk capacity from other common carriers of telecommunications and resell MTS and WATS service through switches operated by MCI, which is commonly referred to as the purchase resale application. (R 170) The main portion of the authority requested by MCI was authority to construct and operate its own microwave telecommunications system to be supplemented by other methods of communications such as satellite, fiber optics, etc. Microtel did not oppose and does not oppose the purchase resale portion of the application and so indicated to the Commission. Accordingly, Order No. 11800 granting the purchase resale certificate is not the subject of this appeal. (R 181)

Statement of Facts

MCI's total case in chief was presented by all company employees with the exception of one expert witness retained by MCI as an expert economist. No public witness testimony was presented by MCI whatsoever. (TR 46) Throughout the direct and cross examination of witnesses presented by MCI, are references to the "Microtel order." Microtel filed an application in March 1980 seeking authority to construct and operate a statewide telecommunication system providing interexchange services on its own facilities. After approximately 2½ years, on August 23, 1982, in Docket No. 800333-TP, by Order No. 11095, Microtel was granted such authority. (See Ex 8, Vol. 5) For convenience of the Court, a copy of the Microtel order is set forth in the Appendix at Pages 1-13 and an amendatory order issued January 13, 1983 at Appendix 14. No appeals were ever taken from the Microtel orders.

The first witness for MCI was its President, Mr. Wright, who indicated that MCI filed for authority in Florida to supplement its interstate network which it intended to construct regardless whether or not they were granted intrastate authority. (TR 78) The witness indicated that he was seeking a certificate identical to that which the Commission had previously issued to Microtel. (TR 44) The witness further indicated that he was not familiar with what

services, if any, Microtel was providing (TR 45) and made the assertion that "we go about making a determination on where we should build and what our construction program should be by doing an economic analysis. We look at the number, number of households in a particular community, and the number of businesses in a particular community." (TR 45) In fact, Mr. Wright said that the only reason MCI is filing for authority in Florida is that it would be a profit center for MCI. (TR 45) MCI, however, did not file with the Commission any market studies, economic analysis, or any other data upon which the Commission could make a determination of public interest. (TR 46) Mr. Wright indicated that MCI would not produce any public witnesses nor did MCI present any analysis of the public market available in the state of Florida to interexchange carriers. (TR 46) The witness was not familiar with what services, if any, were provided by Microtel or proposed by Microtel nor at what cost to the public. (TR 48) The witness indicated in all candor that he had no idea whether MCI was proposing anything that was not already being done or proposed to be done by Microtel for the public of this state. (TR 52)

A second witness, Mr. Prater, Manager of Engineering Standards for MCI, described the construction schedule of the company, but indicated that he was not familiar at all with the engineering design concept of the facilities that Microtel has in place or planned in the state. (TR 99) The witness

had no knowledge of how the fiber optic system was being designed from an engineering standpoint and indicated that all MCI traffic today to and from the state of Florida is handled by carriers other than MCI. (TR 102) Witness did indicate that the digital switch, such as Microtel operates, is superior to that which MCI presently operates in Miami. (TR 103)

The third witness, Mr. Beach, Director of Regulatory and Carrier Relations for MCI, stated that MCI proposed to provide initially the same kind of leased services that they are providing on an interstate basis. (TR 139) The witness indicated that the grant of purchase resale license to MCI would make it possible for all of MCI's customers to have intrastate communications utilizing other carriers the same as it is presently doing with its interstate traffic. (TR 172) The witness acknowledged that there had been complaints filed against MCI with the Federal Communications Commission. He further stated that he in no way was contending that Microtel does not have the technical qualifications to provide quality of services equal to that of MCI. (TR 178) Witness did state that MCI would not be agreeable to uniform rates with other interexchange carriers because it is the company's position that it elects to have its own set of rates and would not become a party to any common tariff in interexchange service. (TR 180)

Dr. Nina Cornell, an expert witness for MCI, testified that the testimony presented in this case was as a paid consultant. (TR 254) She was not familiar whether the rates proposed by MCI were the same or different than those of Microtel and further indicated that until the cost of accessing the local telephone company to originate and terminate interexchange traffic is determined that the ultimate cost of service has not yet been defined. (TR 264) She also stated that until access costs are determined, the number of interexchange carriers to be certificated should remain an open issue.

The President of Microtel sponsored pre-filed testimony consisting of composite Exhibit 6 appearing in Volume 5 of the record. Mr. Johnson described the system being constructed by Microtel pursuant to its previously granted authority combining digital switches and fiber optics to create a state of the art communications system. (TR 282) Mr. Johnson further explained that the law having been changed to encourage competition and the Commission having granted Microtel a license in 1982 to construct a competitive network to the phone companies, he felt that there should be some reasonable period of time before potentially destructive duplicative services be authorized by the FPSC. (TR 300)

No other direct testimony was presented by MCI nor any other party.

ISSUES PRESENTED

ISSUE NO. I. THE COMMISSION DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY IGNORING THE CRITERIA SET FORTH IN 364.337, FLORIDA STATUTES, 1983.

ISSUE NO. II. THE COMMISSION IS CONSTRUING SECTION 364.337(2) HAS BESTOWED UPON ITSELF AN UNBRIDLED DISCRETION TO ADJUDICATE PRIVATE RIGHTS IN CONTRAVENTION OF THE FLORIDA CONSTITUTION; APPLICABLE ADMINISTRATIVE LAW; AND GOVERNING STATUTES.

ISSUE NO. III. MICROTEL IS ENTITLED TO A REASONABLE PERIOD OF TIME TO PROVIDE THE SERVICES AUTHORIZED BY ITS CERTIFICATE BEFORE DUPLICATE AUTHORITY IS GRANTED TO OTHER CARRIERS.

Argument I

ISSUE NO. I. THE COMMISSION DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY IGNORING THE CRITERIA SET FORTH IN 364.337, FLORIDA STATUTES, 1983.

Upon the record of this proceeding, it is clear that MCI sought authority which would allow it to operate facilities completely duplicative of those approved for construction by Microtel in the Commission's Order No. 11095 and in competition with interexchange (i.e., long distance) services offered by Microtel and the other Florida telephone companies. (See generally TR 82-114, Ex. 3, 4). While the former statutory proscription against the competitive provision of intrastate long distance service in Florida was removed by the 1982 Florida Legislature, the Commission is still required to carefully scrutinize the application of specialized carriers seeking a certificate in competition with existing carriers under different requirements than those applied to conventional telephone companies. Section 364.337, Florida Statutes (1982) provides:

> **"Section 364.337 Duplicative or competitive services.**
>
> (1) When the commission grants a certificate to a telephone company for any type of service that is in competition with or that duplicates the services provided by another telephone company, the commission, if it finds that such action is consistent with the public interest, may:

(a) Prescribe different requirements for the company than are otherwise prescribed for telephone companies.

(2) In determining whether the actions authorized by section (1) are consistent with the public interest, the commission shall consider:

(a) The number of firms providing the service;

(b) The geographic availability of the service from other firms;

(c) The quality of service available from alternative suppliers;

(d) The effect on telephone service rates charged to customers of other companies; and

(e) Any other factors that the commission considers relevant to the public interest." (emphasis added).

In construing similar statutes, this Court has held that the Commission must always proceed cautiously before issuing a certificate of public convenience and necessity that duplicates existing service and that new service must not be permitted to vitally impair present service that meets the public needs.

In Wetmore vs. Bevis, 312 So 2nd 722 (FL 1974) The Court was required by its review of the Commission's award of a duplicative certificate to a radio common carrier to construe the former Section 364.41(6) of the Florida Statutes. That provision is analogous to the above-quoted Section 364.337 in that specific inquiries are required to be made by

the Commission when certification of competitive service is sought. In the radio common carrier statute involved in Wetmore, inquiry into the adequacy of existing service had been mandated by the Legislature. The Commission's duty likewise under Section 364.337 is delineated in Subsection (2) in which specific factors are required to be considered in a determination of whether certification of a specialized carrier is consistent with the public interest. This Court found in Wetmore that the absence of specific evidence required by the statute rendered the Commission's issuance of a certificate illegal.

Upon the record in this proceeding, it was impossible for the Commission to make the mandatory findings dictated by Section 364.337(2). MCI presented no testimony on the number of firms providing the service proposed to be offered by MCI: no testimony on the geographic availability of such services from other firms; no testimony on the quality of service available from other suppliers; and no testimony on the effect MCI's certification may have on rates paid by customers of other Florida telephone companies or the public in general. Moreover, MCI elected to sponsor no public witnesses whatsoever on any issue. Instead, the applicant has relied upon the self-serving testimony of its own employees and the gratuitous generic comments of Dr. Cornell on the benefits of competition. (TR 239-252)

By ignoring the information required to be presented to the Commission to permit a finding that specialized certification is consistent with the public interest, MCI urged this Commission to accept its concept of what the "public interest" is without regard for the standards established by the Legislature for that determination. As a matter of constitutional law, the Commission cannot do this. In Delta Truck Brokers vs. King, 142 So 2nd 273 (FL 1962), this Court held that the Public Service Commission, notwithstanding its quasi-judicial powers, cannot be delegated by the legislature with "unbridled discretion" to determine the public interest. In that decision, a statute permitting the Public Service Commission to "alter, restrict, or modify" the terms of an automobile brokerage license "where the public interest may be best served thereby" was declared unconstitutional due to the absence of "adequate standards to guide the ministerial agency in the execution of the powers delegated" 142 So2nd 275-76. As the Commission recognized in Order No. 11095, App 1, granting certification to Microtel, the Commission has broad discretion in regulating the provision of interexchange services, however:

> "Notwithstanding this important shift, it remains prudent to consider the issues raised during the hearing under the former statutes. Stated differently, to reasonably exercise our discretion under Section 364.37, Fla. Stat. (1982), the Commission must understand the extent to which the proposed service is duplicative of or in competition with existing service,

> and how well existing service is meeting the needs of the public."

It is elementary that the Commission must base its action upon substantial competent evidence and that the burden of proof is upon the party seeking that action. Blocker's Transfer & Storage Co. vs. Yarborough, 277 So2nd 9 (FL 1973); Greyhound Corp. vs. Carter, 123 So2nd 9 (FL 1960); Great Southern Trucking Co., 54 So2nd 153 (FL 1951); Bellino vs. Dept. of Health and Rehabilitative Services, 348 So2nd 349 (FL 1st D.C.A. 1977); Department of Agriculture and Consumer Services vs. Strickland, 262 So2nd 893 (FL 1st D.C.A. 1972); 1 FL Jur. 2d, "Administrative Law," Section 81 at 858. In effect, MCI has limited its case to a demonstration that it can compete with existing providers of interexchange services and that competition in the abstract is in the public interest. The applicant seems to consider that what is good for MCI is good for the citizens of Florida. In Blocker's Transfer & Storage Co. vs. Yarborough, 277 So2nd 9 (FL 1973), this Court recognized that the award of a certificate might indeed benefit the company seeking it, then quoted from a 1935 opinion:

> "The purpose of issuing certificates of public convenience and necessity is not for the advantage and benefit of the applicants requesting them, but is primarily for the public convenience and general welfare which are paramount to other problems. See 277 So2nd at 12, quoting Central Truck Lines vs. Railroad Commission, 118 FL 555, 160 So 26 (1935)."

The Commission should have determined whether MCI had met its legal burden of proving that approval of its application for a certificate of public convenience and necessity is in the public interest by reasonable, competent, substantial evidence. In at least the following respects, MCI's evidenciary presentation is deficient and the request for a certificate should have been denied:

A. MCI will be in competition with existing telephone carriers in Florida providing interexchange services including complete duplication of the services to be provided in the areas presently served by Microtel or proposed to be served by Microtel. Since MCI's Chief Operating Officer, Mr. Wright, could not state how the services proposed by MCI are not presently available by Microtel or other interexchange carriers, there can be no finding as in Order No. 11095 on Microtel's application that MCI can "offer the Florida public new options not presently available or likely to be made available by the existing companies." (EX 6, Page 6) Accordingly, to grant MCI's application for authority to operate as a specialized common carrier, that is, under "different requirements" than conventional local exchange carriers, the Commission must determine that such authorization is consistent with the public interest based upon the considerations mandated by Section 364.337, Florida Statutes (1982). The Commission could not legally make this determination upon the record in this proceeding.

B. No public witnesses whatsoever were presented by the applicant. This further limits the Commission's ability to make any determination of the public interest based upon competent evidence.

C. No market study, feasibility study, or any other data was presented to indicate that it would be in the public interest to grant MCI's application.

D. Evidence presented at the hearing as to the sufficiency of technical and financial resources available to implement MCI's proposals relate solely to the applicant's parent company, a stranger to these proceedings. Absolutely no evidence was been presented as to the technical and financial fitness of the applicant itself.

E. While the testimony of MCI's expert witness, Dr. Cornell, discusses the potential effects of intrastate competition upon the citizens of Florida, no studies utilizing Florida data or any other studies have been provided.

F. The evidence reflects that MCI is totally unfamiliar with Microtel's rates on file with this Commission or the services authorized to be provided by Microtel or those currently provided by Microtel and other Florida telephone companies. Accordingly, MCI cannot claim to have provided evidence on the effect its specialized certification would have upon "service rates charged to customers of other companies" as required by Section 364.337(2)(d), Florida Statutes (1982).

In summary, the total evidence presented by MCI leads to the conclusion that MCI's proposal simply involves the provision of competitive, duplicative interexchange services within selected areas of the state of Florida currently served or proposed to be served by Microtel under its recently granted authority and presently served by existing telephone utilities. The evidence of MCI does not refute the wasteful duplication which would result from the offering of its proposed services. Rather MCI's showing as to the public interest is simply that:

(1) Competition is good.

(2) MCI does not care what carriers presently provide service nor have they made any effort to ascertain what carriers provide similar services.

(3) Lower rates are good even though MCI does not know what the rates of other carriers are or whether MCI's rates would in fact be lower.

(4) MCI will serve only if a proper access charge is established and a profit center can be developed for MCI regardless of the public interest.

It is submitted by Microtel that this record is totally inadequate to support the findings which the Commission is charged with making under the Florida Statutes and which are a pre-requisite for a grant of a specialized application in whole or in part.

Argument II

ISSUE NO. II. THE COMMISSION IN CONSTRUING SECTION 364.337(2) HAS BESTOWED UPON ITSELF AN UNBRIDLED DISCRETION TO ADJUDICATE PRIVATE RIGHTS IN CONTRAVENTION OF THE FLORIDA CONSTITUTION; APPLICABLE ADMINISTRATIVE LAW; AND GOVERNING STATUTES.

All of the matters that have been discussed here-in-above under Issue I were clearly brought to the Commission's attention in the Motion for Reconsideration, Motion for Stay, and Request for Oral Argument filed by Microtel August 9, 1983. (R 272) Notwithstanding this, and after oral argument was presented on said Motion to the Commission, the Commission entered Order No. 12824 denying reconsideration and at Page 2 thereof stated as follows:

> "Microtel argues in No. 4 of its Motion that Section 364.337(2) requires findings be made on the enumerated items when we grant a certificate to a competitive telephone company. Our reading of that subsection is that we are to consider those items in determining whether to prescribe different requirements for the competing company or exempt it from some or all of the requirements of Chapter 364. In determining the basic grant of authority, we are governed by Section 364.335, Florida Statutes." (emphasis added) (see R 308)

Reference to Section 364.335 states in part as follows:

> "(4) The Commission may grant a certificate, in whole or in part, or with modifications in the public interest, but

> in no event granting authority greater than requested in the application or amendments thereto and noticed under Subsection (1); or it may deny a certificate..."

The next section of the statute, enacted at the same session, is Section 364.337 with which we are concerned on this appeal. This section the Court will note clearly states in the first sentence as follows:

> "(1) When the Commission grants a certificate to a telephone company for any type of service that is in competition with or that duplicates the services provided by another company, the Commission, <u>if it finds that such action is consistent with the public interest</u>, may:..."

Subsection 2 of that same section of the statute clearly states as follows:

> "In determining whether the actions authorized by Subsection 1 <u>are consistent with the public interest</u> the Commission, shall consider:
>
> (2) In determining whether the actions authorized by subsection (1) are consistent with the public interest, the commission shall consider:
>
> (a) The number of firms providing the service;
>
> (c) The quality of availability of the service from other firms;
>
> (d) The effect on telephone service rates charged to customers of other companies; and

> (e) Any other factors that the commission considers relevant to the public interest.
>
> Added by Laws 1982, c. 82-51, Section 4, eff. March 19, 1982."

In construing the statute as the Commission has done, it would grant to the Commission an unbridled right to determine arbitrarily whether to grant or deny a certificate with no standards whatsoever in determining public interest. Such clearly would be an improper delegation of powers to the quasi-judicial administrative agency by the legislature and has consistently been held to be improper and unconstitutional by this Court.

Justice Thornall, a reknown scholar of the law, in speaking for the Court in Delta Truck Brokers, Inc. vs. King, et al, supra, succinctly pronounced the proper summary of the Florida law on this issue as follows at Page 275 of said decision:

> "In reply the petitioners contend that such a broad statutory prescription without accompanying legislative standards constitutes an unconstitutional delegation of legislative power to an administrative board. Again we are compelled to agree with the petitioners. The Constitution vests the legislative power of the state in the State Legislature. Article III, Section 1, Florida Constitution, F.S.A. The Legislature may, of course, delegate the performance of certain functions to administrative agencies provided that in doing so it announces adequate standards to guide the minsterial agency in the execution of powers delegated. The Legislature cannot delegate to an administrative agency, even one clothed

> with certain quasi-judicial powers, the unbridled discretion to adjudicate private rights. It is essential that the act which delegates the power likewise defines with reasonable certainity the standards which shall guide the agency in the exercise of power." (emphasis added)

This Court again in High Ridge Management Corp., etc. vs. State, 354 So2nd 377, FL 1978, stated at Page 380 as follows:

> "(1) This Court, in Dickinson vs. State, 227 So 2nd 36, 37 (FL 1969) emphasized that statutes delegating power without adequate protection against unfairness or favoritism should be invalidated and that the exercise of the police power by the Legislature must be clearly defined and limited in scope so that nothing is left to unbridled discretion or whim of the administrative agency responsible for enforcement of the act. See also Delta Truck Brokers, Inc. vs. King, 142 So2nd 273 (FL 1962)"

The language of the Florida Commission in indicating that it has the power to grant or deny the certificate for duplicative telecommunications certificates with no standards prescribed whatsoever is such a blatant violation and repugnant unconstitutional construction of the statute that it should be reversed on its face. What standard would the Commission use in determining whether to grant a duplicative certificate? The color of the eyes of the President, the size of the company, the domicile of the company, the number of PHD's employed by the company?

It brings to mind the language of this Court in Lewis vs. Bank of Pasco County, 346 So2nd 53, FL 1977, at Page 55:

> "(2) The legal principal guiding the Circuit Judge in this case and which is dispositive of the issue under consideration is so well known as to be deemed "hornbook" law. This Court has held in a long and unvaried line of cases that statutes granting power to administrative agencies must clearly announce adequate standards to guide the agencies in the execution of the powers delegated. The statute must so clearly define the power delegated that the administrative agency is precluded from acting through whim, showing favoritism, or exercising unbridled discretion. Dickinson vs. State, 227 So2nd 36 (FL 1969(; Conner vs. Joe Hatton, Inc., 216 So2nd 209 (FL 1968)."

It is exiomatic that if a statute may be construed in two ways, one invalid, and the other valid, the statute will be construed in a manner to preserve its validity. Microtel submits that the statute is valid as construed herein. However, the construction by the Commission grants it wholesale power to grant or deny telephone certificates with no standards whatsoever. Such construction would clearly void the statute. The writer of this brief assisted the Commission in having the legislation enacted. It is inconceivable that the Commission would now take the position that the standards only applied to determining what exemptions should apply.

This Court must correct this wrong by this agency consistent with this Court's precedents.

Argument III

ISSUE NO. III. MICROTEL IS ENTTILED TO A REASONABLE PERIOD OF TIME TO PROVIDE THE SERVICES AUTHORIZED BY ITS CERTIFICATE BEFORE DUPLICATE AUTHORITY IS GRANTED TO OTHER CARRIERS.

The application filed by MCI presented to the Commission a case of first impression under the 1982 amendments to Chapter 364, Florida Statutes. Never before had the Commission been called upon to address the issues which are implicit in MCI's request that it be allowed to offer competitive intrastate services which duplicate those services presently being offered by not only the functioning telephone utilities in Florida, but also by Microtel under its present and proposed services. It was essential that the Commission consider the economic realities associated with the provision of completely duplicative telecommunications interexchange services in this State.

Such consideration must recognize that it is not possible to realize the benefits of competition in this market, as it were, overnight. As stated in the Microtel Order No. 11095, (App 1):

> "The Commission has consistently advocated competition over regulation. Competition is superior to regulation in bringing the benefits of economic enterprise to the public. However, <u>in moving from a mostly regulated industry to a mostly unregulated one, it is necessary to protect against economic dislocation.</u> This requires a full

understanding of the effect a new entrant will have on existing services and on the consuming public." (emphasis supplied)

This concern is also reflected in the Commission's support during the 1982 Florida Legislature for the language of Section 364.337(2) discussed in the previous argument. Within the legislative standards set forth in the statute, the Commission has broad discretion to regulate competition among providers of long distance service in the public interest. Although a superficial analysis might see Microtel's position in this case as analogous, that is, as seeking "protection" from the very competition it has advocated, adherence to sound policy will indicate that the acknolwedged benefits for competition cannot be realized without viable competitors. Judicious regulation during this transition in the telecommunications industry is crucial to future competition. Whether future competition may be in jeopardy by premature duplication of interexchange authority should have been demonstrated in the MCI case. As previously noted, such determination was impossible upon the the record.

Section 364.345(1), Florida Statutes (1982) provides in part:

"(1) Each telephone company shall provide adequate and efficient service to the territory described in its certificate within a reasonable time as prescribed in the commission order." (emphasis supplied)

It is a necessary implication of this statute that a certificated telephone company is entitled to a "reasonable time" within which to commence service. The Commission is fully empowered, under its discretion to determine the public interest, and to decline to grant a duplicative and competitive certificate until the passage of sufficient time to allow implementation of previously granted authority. It should be emphasized, however, that in the present case, the exercise of such discretion is not necessary. The present record being is wholly deficient in the statutorily required information necessary to any determination of the public interest.

Moreover, it has been the Commission's primary concern that all those members of the public who desire local exchange service in the State of Florida be able to obtain it at reasonable cost. It is for this reason that the Commission insisted upon the mandatory language in the 1982 amendments to Chapter 364, Florida Statutes which require consideration of the effect upon Florida rate payers when duplicative services or competing certificates are sought by specialized carriers.

The Microtel certificate was granted August 23, 1982. Millions of dollars are being expended constructing a statewide digital fiber optic state of the art telecommunications system by Microtel pursuant to said certificate. (See testimony of Johnson Ex 6; R. Vol. 5) Hearings in this case were held March 14, 1983. The Commission, in granting a certificate to

Microtel, recognized that it would take two years to construct the system. See App 1.

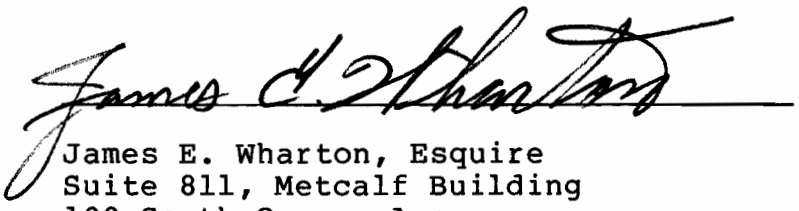
Section 364.345(1), supra, clearly recognizes such problems. The Commission, however, chooses to ignore the clear mandates of the statutes under which it must operate. Such action by an administrative agency cannot and should not be condoned. This premature granting of duplicative certificates clearly violates the statute and the Commission's own findings in the Microtel order.

C O N C L U S I O N

The Commission ignored the mandate of Section 364.337 in granting an application based upon company testimony only. The Commission, in construing Section 364.337, has granted to itself an "unbridled discretion" to grant or deny interexchange certificates in complete disregard of the Florida Constitution, Florida Statutes, and direct precedent of this Court. The Commission has ignored the requirement of Section 364.345 which contemplates that an existing certificate holder be given a reasonable period of time within which to conduct operations before a competing certificate is granted.

For the reasons assigned, Microtel requests this Court to reverse the orders of the Commission, or in the alternative, to remand this case with appropriate instructions.

Respectfully submitted,



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Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been furnished by first class mail on this 4th day of April, 1984 to Richard Melson, PO Box 6526, Tallahassee, FL 32301, Jim Cariedo, PO Box 110 MC 7, Tampa, FL 33601, Lloyd Nault, 666 NW 79th Avenue, Rm. 680, Miami, FL 33126, Noreen Davis, Legal Department, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, FL 32304, Kenneth Cox, 1133 19th Street, NW, Washington DC 20036, Prentice Pruitt, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, FL 32304, Gene Coker, 4300 Southern Bell Center, Atlanta, GA 30375, and Robert L. Hinkle, PO Drawer 810, Tallahassee, FL 32302.

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